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IN THE

Supreme Court of the United States

October Term, 1957

No. 737

IRENE SHERMAN,
Petitioner,

AGAINST

SAM SHERMAN and SAMUEL W. SIEGEL,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner submits this reply brief in support of her petition for a writ of certiorari for the reason that respondents have confused the issues raised in the original brief in support of the petition. One concerns itself with the timeliness of the petition. In preparing the original brief, we believed that the question was so fundamental that it did not require the citation of lengthy authority. We find, however, that respondent Sam Sherman has devoted an entire point to the timeliness of the filing of the petition. The statutory requirement (28 U. S. C. Section 2101, (c)) demands that the application be made within ninety (90) days after the entry of the judgment or decree in the civil action from which the appeal is sought. The question then presents itself as to when this ninety

(90) day period commences to run. In *Citizens Bank* v. *Opperman*, 249 U. S. 448, the State Supreme Court of the State of Indiana had affirmed a judgment. A petition to the same Court to rehear was later overruled. This Court held:

> "When a petition for rehearing is entertained the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of and the three months' limitation begins to run from date of such denial or other disposition."

In *U. S.* v. *Seminole Nation*, 299 U. S. 417, the defendant had made two motions in the Court of Claims for new trials, one based on the applicable statute in the U. S. Code and the other based on a rule of the Court of Claims. The plaintiff urged that the petition for the writ of certiorari was not timely made because it was not made within three (3) months after the denial of the first motion, though made within three (3) months after denial of the second motion. This Court held (p. 421):

> "On this record, it is reasonably to be inferred, and we find, that the second motion was one filed in accordance with the rule under which application for leave was necessary and not one authorized by the statute for the filing of which permission of the Court was not needed. It is clear that the three (3) months' period * * * did not commence to run until the Court disposed of that motion * * *. It is well settled that the time within which application may be made for review in this Court does not commence to run until after the disposition of the motion for a new trial seasonably filed and entertained."

Neither respondent seriously contends that the petition for the writ was not made within ninety (90) days after the denial of the motion for leave to reargue in the Court of Appeals. The Court is respectfully referred to the date of the order of the Court of Appeals, which is October 24, 1957. The petition was filed herein on January 22, 1958.

The other issue which we feel requires additional elaboration is based upon certain contentions raised in the briefs of respondents. It is urged that the Executor, Siegel, performed his job honorably and well. While we do not concede this point, we contend that this is not the issue. We do not seek relief in this Court because of the patent conflict of interest or because of misfeasance, malfeasance or indeed nonfeasance of the Executor-Evaluator.

Rather the issue is the right of the New York Courts to ignore the plain and avowed public policy, clearly enunciated by the New York State Legislature, as contained in Section 125 of the Decedent Estate Law, and the failure or refusal of the New York Courts to follow such legislative public policy. This issue should be decided by the highest court in our land.

Unless it contravenes the Constitution, this declared public policy of the New York State Legislature is the Law of the State. This view has been repeatedly held and affirmed by the Courts of the various States, as well as by this Court. In *F. A. Strauss & Co. v. Canadian Pac. Ry. Co.*, 254 N. Y. 411, the New York State Court of Appeals stated:

> "The power to determine what the policy of the law shall be rests with the Legislature within constitutional limitations, and when it has expressed itself well and established a new policy, Courts are required to give effect to such policy."

In the earlier case of *Veasey* v. *Allen*, 173 N. Y. 359, the New York State Court of Appeals had this to say on the question of public policy:

> "This contract is assailed on the ground of public policy. Lord Broughham defined public policy as 'that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be deemed the policy of the law, or public policy in relation to the administration of the law'."

Not only the State Courts, but even the Federal Courts are bound to give full force and effect to such public policy (*The Kensington*, 183 U. S. 263) (*Bank of Augusta* v. *Earle*, 13 Pet. 519, 597). If the public policy does not contravene the Constitution, then the only question to be decided is the one of reasonableness. In *Antoni* v. *Greenhow*, 107 U. S. 769, 775, this Court said:

> "In all such cases the question becomes, therefore, one of reasonableness, and of that, the legislature is primarily the judge. We ought never to overrule the decisions of the legislative department of the government, unless a palpable error has been committed. If a state of fact could exist that would justify the change in a remedy which has been made, we must presume that it did exist, and that the law was passed on that account. We cannot question the motives of the legislature, if what they do is within the scope of their powers under the Constitution."

Petitioner here is aggrieved by reason of the fact that the Courts have failed to give any force and effect or any due accord and recognition to an avowed public policy

statute or to follow the spirit and intent of a law enacted by a State Legislature.

Petitioner was thereby denied equal protection and deprived of due process of law.

Respondent, Siegel, urges that the contract between decedent and decedent's brother was valid and binding upon the decedent's estate. He quotes many decisions of the State of New York which have recognized such contracts as valid and enforceable. He has deliberately avoided debating the real principles of law involved herein or has innocently overlooked them. We do not quarrel with the cases cited, and under other circumstances such a contract would be enforceable.

However, he has lost sight of the application and significance of a legislative declared public policy of a State, which is an unwritten implied condition applicable to the documents in the case at bar. It cannot be seriously contended that because there were two documents, that is, a contract and a will, that public policy should, therefore, be ignored. This could only encourage circumvention of a statute, of an avowed public policy and the acts of a State Legislature.

In *Home Bldg. & L. Assn* v. *Blaisdell*, 290 U. S. 398, this Court said (p. 434):

> "* * * but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to the end 'has the result of modifying or abrogating contracts already in effect' (*Stephenson* v. *Binford*, 287 U. S. 251, 276). Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."

Petitioner's application for the writ is based upon the time honored fundamental principle that no person shall be denied due process of law or deprived of rights guaranteed by the Constitution and for these reasons the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SAMUEL A. SPIEGEL,
Counsel for Petitioner.